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No. 07-582

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., CBS BROADCASTING, INC., AND ABC, INC.

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QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. § 1464; *see* 47 C.F.R. § 73.3999, when the expletives are not repeated.

RULE 29.6 STATEMENT

NBC Universal, Inc. operates the NBC and Telemundo broadcast networks, as well as nonbroadcast television networks. NBC Universal, Inc. is owned by National Broadcasting Company Holding, Inc. (which is a wholly owned subsidiary of General Electric Company) and by Vivendi Universal, S.A., a publicly traded company.

NBC Telemundo License Company is the licensee or controlling parent entity of the licensees of several full-power television broadcast stations. It is a wholly owned subsidiary of NBC Telemundo, Inc., which is owned by both NBC Telemundo Holding Company (a wholly owned subsidiary of General Electric Company), and by NBC Universal, Inc.

General Electric Company has no parent company, and no publicly held company owns ten percent or more of its stock.

CBS Broadcasting Inc. states that CBS Corporation, a publicly held company, owns an interest of ten percent or more in CBS Broadcasting Inc.

ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation.

TABLE OF CONTENTS

Page

STATEMENT 1

INTRODUCTION AND SUMMARY OF ARGUMENT 11

ARGUMENT 15

I. THE REMAND ORDER VIOLATES THE FIRST AMENDMENT 15

A. The Broadcasters' First Amendment Arguments Are Properly Before This Court 15

B. The Indecency Definition Applied In The Remand Order Is Impermissibly Vague 20

C. The Remand Order Fails Any Standard Of Scrutiny Appropriate To Restrictions Of Broadcast Content 30

1. There Is No Longer A Sound Basis For According Relaxed Scrutiny To Content-Based Restrictions Of Broadcast Speech 32

2. Isolated Expletives Are Not Constitutionally Indecent Speech 39

3. The Commission Has Failed To Demonstrate That Targeted Blocking Of Indecent Broadcasts Cannot Achieve The Commission's Asserted Goal Of Protecting Children From Indecent Material 43

TABLE OF CONTENTS—Continued

Page

II. THE REMAND ORDER FAILS TO PROVIDE A REASONED EXPLANATION FOR THE AGENCY'S RADICAL CHANGE IN COURSE.....47

CONCLUSION.....54

TABLE OF AUTHORITIES

Page

Cases

Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).....51

Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).....21

Alexander v. United States, 509 U.S. 544 (1993).....30

Ashcroft v. ACLU, 542 U.S. 656 (2004).....*passim*

Baggett v. Bullitt, 377 U.S. 360 (1964).....30

Belcher v. Stengel, 429 U.S. 118 (1976).....16

Blum v. Bacon, 457 U.S. 132 (1982).....17

CBS Corp. v. FCC, — F.3d —, No. 06-3575, 2008 WL 2789307 (3d Cir. July 21, 2008).....50

CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).....37

Cohen v. California, 403 U.S. 15 (1971).....32, 41, 42

Consumer Elecs. Ass'n v. FCC, 347 F.3d 291 (D.C. Cir. 2003).....38, 45

TABLE OF AUTHORITIES—Continued

Page

Crandon v. United States, 494 U.S. 152 (1990) 43

Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) .....*passim*

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980).....17

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999).....19

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).....31, 40

FCC v. ABC, 347 U.S. 284 (1954) 20

FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984).....31, 36, 37

FCC v. Pacifica Found., 438 U.S. 726 (1978) ...*passim*

Forney v. Apfel, 524 U.S. 266 (1998).....17, 18

Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992).....25

Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).....20

Ginsberg v. New York, 390 U.S. 629 (1968).....39, 42

Hill v. Colorado, 530 U.S. 703 (2000).....24

Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968).....51

Jones v. United States, 527 U.S. 373 (1999).....18

LeMoyne-Owen Coll. v. NLRB, 357 F.3d 55 (D.C. Cir. 2004).....48

TABLE OF AUTHORITIES—Continued

Page

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) 31

Miller v. California, 413 U.S. 15 (1973) 23

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 48

NBC v. United States, 319 U.S. 190 (1943) 35, 36

NCTA v. Brand X Internet Servs., 545 U.S. 967 (2005) 48

Nw. Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994) 17

Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89 (1954) 17

Ramaprakash v. FAA, 346 F.3d 1121 (D.C. Cir. 2003) 48

Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) ..... *passim*

Reno v. ACLU, 521 U.S. 844 (1997) ..... *passim*

Rosenfeld v. New Jersey, 408 U.S. 901 (1972) 41, 42

Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989) 31, 39

Speiser v. Randall, 357 U.S. 513 (1958) 20

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) ..... *passim*

TVA v. Hill, 437 U.S. 153 (1978) 39

TABLE OF AUTHORITIES—Continued

Page

United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) ..... *passim*

United States v. Williams, 128 S. Ct. 1830 (2008) 27, 28

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 21

Statutes and Regulations

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 140 47

18 U.S.C. § 1464 ..... *passim*

47 U.S.C. § 223(d)(1)(B) 21

47 U.S.C. § 303(x) 43, 45

47 U.S.C. § 309(j)(14)(A) 38

47 U.S.C. § 503(b)(2)(C)(ii) 30

47 U.S.C. § 548(g) 33

47 C.F.R. §§ 301.1–301.2 45

47 C.F.R. § 301.5(d) 45

Miscellaneous

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 21 F.C.C.R. 2503 (2006) 33

General Fairness Obligations of Licensees, 102 F.C.C.2d 145 (1985) 36

TABLE OF AUTHORITIES—Continued

Page

In re Applications of Lincoln Dellar,
8 F.C.C.R. 2582 (Audio Servs. Div. 1993).....3, 50

In re Citizen's Complaint Against Pacifica Found. Station WBAI,
56 F.C.C.2d 94 (1975).....2

In re Complaint of Syracuse Peace Council Against Television Station WTVH,
2 F.C.C.R. 5043 (1987).....36, 37

In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program,
18 F.C.C.R. 19,859 (E.B. 2003).....4, 5

In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program,
19 F.C.C.R. 4975 (Mar. 18, 2004).....*passim*

In re Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue,"
23 F.C.C.R. 3147 (2008).....26

In re Complaints Against Various Television Licensees Regarding Their Broad. of "Saving Private Ryan,"
20 F.C.C.R. 4507 (2005).....25

In re Implementation of Section 551 of the Telecommunications Act of 1996,
13 F.C.C.R. 8232 (1998).....44, 47

TABLE OF AUTHORITIES—Continued

Page

In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999 (2001).....*passim*

In re Infinity Broad. Corp., 3 F.C.C.R. 930 (1987).....3

In re Pacifica Found., Inc., 2 F.C.C.R. 2698 (1987).....37

In re Repeal of Modification of the Personal Attack and Political Editorial Rules, 15 F.C.C.R. 19,973 (2000).....36

New Indecency Enforcement Standards, 2 F.C.C.R. 2726 (1987).....3

WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838 (2000).....26

Annenberg Public Policy Center, *Parents Use of the V-Chip to Supervise Children's Television Use* (2003) 45

Katy Bachman, Satellite TV Continues to Bite into Wired Cable, *MediaWeek* (June 11, 2008).....33

John W. Berresford, The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed (2005) 34, 37

Lewis Carroll, Through the Looking Glass, in The Complete Works of Lewis Carroll (1939).....39

TABLE OF AUTHORITIES—Continued

Page

John Eggerton & Allison Romano, *Pre-Empting Private Ryan*, BROAD. & CABLE (Nov. 10, 2004) 28

Federal Communications Commission, *High-Speed Services for Internet Access: Status as of June 30, 2007* (Mar. 2008) 34

Federal Communications Commission, News Release: Broadcast Station Totals as of December 31, 2007 (Mar. 18, 2008) 38

Federal Communications Commission, News Release: Commission Finds Industry Video Programming Ratings System Acceptable (Mar. 12, 1998).....44

Larry Neumeister, *Some CBS Affiliates Worry over 9/11 Show*, ASSOCIATED PRESS (Sept. 3, 2006) 29

Donald F. Roberts et al., *Generation M: Media in the Lives of 8–18 Year-Olds* (2005).....35

Statement by President William J. Clinton Upon Signing the Telecommunications Act of 1996, 1996 U.S.C.C.A.N. 228-1 (Feb. 8, 1996).....47

U.S. Census Bureau, *Selected Social Characteristics in the United States: 2006* 34

BRIEF OF RESPONDENTS NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., CBS BROADCASTING, INC., AND ABC, INC.

Respondents respectfully submit that the judgment of the court of appeals should be affirmed.

STATEMENT

This is a case about the First Amendment. In 2004, the Commission created a regime of arbitrary, unjustified, and wholly unpredictable content-based restrictions under the guise of protecting children from "broadcast indecency"—notwithstanding the absence of such restrictions in the multitude of other media available to children. Parents have at their disposal a congressionally prescribed means of blocking unwanted broadcast content. Nevertheless, to suppress the occasional expletive that might slip through that filter, the Commission has concocted an indeterminate and infinitely malleable understanding of "indecency" that rejects as "no longer good law" any agency precedents that ever constrained that proscription in application.

The Commission's new indecency enforcement regime depends, in the first instance, largely on complaints mass-generated over the Internet by activist ideological groups determined to impose on the rest of the country their narrow sensibilities—views that, however sincerely they might be held, do not plausibly resemble any national community standard of what is "patently offensive." Whether broadcasters are exposed to millions of dollars in fines based on these "complaints" depends, ultimately, on the Commissioners' evaluation of each broadcast's "artistic merit"—which is to say, on their individual *tastes*. Not surprisingly, adjudications under this protean policy are demonstrably capricious; they flip and flop

only to flip back again and display a unique talent for drawing inexplicable lines. The Second Circuit was right to conclude that the Commission has not adequately justified this new and arbitrary policy, and it was also right to suggest that the policy is deeply at odds with basic First Amendment freedoms.

1. George Carlin's "Filthy Words" monologue was a 12-minute routine in which Carlin listed "the words you couldn't say on the public . . . airwaves" and "proceeded to list those words and repeat them over and over again in a variety of colloquialisms." *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978). After a daytime broadcast of "Filthy Words," the Commission invoked 18 U.S.C. § 1464, a criminal statute, which bars the utterance of "any obscene, indecent, or profane language by means of radio communication," and brought an enforcement action against the broadcaster. In that proceeding, the Commission articulated the following definition of broadcast indecency: "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *In re Citizen's Complaint Against Pacifica Found. Station WBAI*, 56 F.C.C.2d 94, 97–98 ¶ 11 (1975). The Commission concluded that Carlin's monologue violated that standard.

Conceding that the "Filthy Words" monologue fit within the Commission's definition of indecent material, *see Pacifica*, 438 U.S. at 739, the broadcaster challenged the sanction on statutory and First Amendment grounds. This Court recognized that the words used in Carlin's monologue were not "out-

side the protection of the First Amendment," and that Carlin's "monologue would be protected in other contexts," but it upheld the Commission's sanction. The Court emphasized the "narrowness of [its] holding" and stated it "ha[d] *not* decided that an occasional expletive . . . would justify any sanction," much less "a criminal prosecution." *Id.* at 746, 750 (emphasis added). Carlin's monologue, however, was tantamount to "verbal shock treatment," and thus properly sanctionable. *Id.* at 760–61 (Powell, J., concurring).

In the years that followed, the Commission generally limited its enforcement actions to *sustained and repeated* uses of the "seven particular words that were broadcast in [the] George Carlin monologue." *New Indecency Enforcement Standards*, 2 F.C.C.R. 2726, 2726 (1987). Its enforcement policy was *not* aimed at programs that contained "merely an occasional . . . expletive, but instead" at content that "dwelt on sexual and excretory matters in a pandering and titillating fashion." *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 933 ¶ 20 (1987). Therefore, the Commission repeatedly ruled that the utterance of a single, fleeting expletive was not indecent. *E.g.*, *In re Applications of Lincoln Dellar*, 8 F.C.C.R. 2582, 2585 ¶ 26 (Audio Servs. Div. 1993).

In 2001, the Commission sought to clarify its indecency standard and to "provide guidance" to the broadcast community as to how it would be applied. *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 8016 ¶ 30 (2001) ("*Industry Guidance*"). Echoing its decision in *Pacifica*, the Commission set out a two-part test for broadcast indecency: (1) "the material must describe or depict sexual or excretory

organs or activities," and (2) it must be "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶¶ 7–8. In measuring the offensiveness of any particular broadcast—the second step of its indecency test—the Commission informed broadcasters that it would look to three factors: "(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*." *Id.* at 8003 ¶ 10.

In accordance with that two-part definition, the *Industry Guidance* cites several cases where the disputed broadcast was determined *not* to be indecent, either because the language, in context, did not "inescapabl[y]" have a "sexual import," or because the sexual or excretory reference was "fleeting and isolated." 16 F.C.C.R. at 8006, 8008–09 ¶¶ 15, 18 (citing cases).

2.a. The Commission's approach to fleeting expletives changed abruptly and dramatically after NBC's 2003 live broadcast of the *60th Annual Golden Globe Awards*. Accepting an award, Bono exclaimed: "This is really, really, fucking brilliant. Really, really great." *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4976 n.4 (2004) (*Golden Globe II*). The Commission received 234 complaints about this statement, though all but 17 were mass-generated by a single advocacy group, the Parents Television Council. *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18

F.C.C.R. 19,859, 19,859 ¶ 2 (E.B. 2003) ("*Golden Globe I*").[1]

The Commission's Enforcement Bureau denied all complaints. *Golden Globe I*, 18 F.C.C.R. at 19,862 ¶ 7. Applying the indecency standard as it had long been understood, the Bureau held that although "[t]he word 'fucking' may be crude and offensive . . . in the context presented here, [it] *did not describe sexual or excretory organs or activities*. Rather, the performer used the word 'fucking' as an adjective or expletive to emphasize an exclamation." *Id.* at 19,861 ¶ 5 (emphasis added). The Bureau also noted the Commission's consistent view that "fleeting and isolated remarks of this nature do not warrant Commission action." *Id.* at 19,861 ¶ 6.

The Commission, however, reversed the Bureau's decision and introduced a fundamentally new interpretation of its indecency standard. *Golden Globe II*, 19 F.C.C.R. at 4975–82. In lieu of analyzing whether Bono's words actually depicted or described sexual or excretory activity—as required by the first step of the Commission's test—the Commission held that "*any* use of [the 'F-Word'] or a variation, in *any* context, inherently has a sexual connotation." *Id.* at 4978 ¶ 8 (emphases added). The Commission also flatly declared that its previous contrary precedent was "no longer good law." *Id.* at 4980 ¶ 12. The entire broadcasting industry sought reconsideration of

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[1] The Parents Television Council screens television programs and then blankets cyberspace with e-mails about content it finds objectionable. The mass e-mails draw traffic to the Council's website, where anyone can submit a complaint to the Commission—whether the complainant has viewed a program or not. *See, e.g.*, Parents Television Council, *File an FCC Broadcast Indecency Complaint*, http://www.parentstv.org/PTC/fcc/fcccomplaint.asp (last visited July 31, 2008).

this radical departure from established practice, but the Commission has never acted on those petitions, thus foreclosing judicial review of *Golden Globe II*.

b. In 2006, the Commission issued a new ruling, the Omnibus Order, in which the Commission applied to an entirely new set of programs the indecency standard it announced in its unreviewed decision in *Golden Globe II*. Jt. App. 24–178. The Commission adjudicated as "indecent" the broadcast of fleeting expletives in four programs:

- The isolated use of the word "bullshit" by a New York City detective in episodes of ABC's *NYPD Blue*. *Id.* at 98–105.
- The single use of the word "bullshitter" during a live news interview on CBS's *The Early Show*. *Id.* at 105–09.
- A single, unscripted use of the phrase "fuck 'em" by Cher during a live broadcast by FOX of the *2002 Billboard Music Awards*. *Id.* at 86–91.
- An unscripted moment during FOX's live broadcast of the *2003 Billboard Music Awards*, during which presenter Nicole Richie stated, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.* at 91–98.

c. Several broadcasters filed petitions for review in the court of appeals, seeking judicial review of the Commission's "new approach." *Golden Globe II*, 19 F.C.C.R. at 4982 ¶ 15. Faced with that prospect, the Commission asked the Second Circuit to remand the case so the Commission could "reconsider" its order in light of the "constitutional and statutory challenges" raised by the broadcasters. Despite the long administrative pendency of the broadcasters' identi-

cal challenges to the order in *Golden Globe II*, these challenges were apparently so new and surprising to the Commission that it sought leave from the court of appeals "to address the petitioners' argument[s] in the first instance." Mot. for Voluntary Remand at 2, 4, 5. A remand, the Commission declared, would enable the Second Circuit "to cleanly address the important constitutional and statutory arguments presented by this case without procedural detours." Reply in Supp. of Joint Mot. for Voluntary Remand at 10. The Second Circuit accepted the Commission's representations and remanded the case to the Commission. Pet. App. 15a.

On remand, in the shadow of judicial review, the Commission changed course yet again and reached altogether new—and different—conclusions about the purported "indecency" of the various programs addressed in the Omnibus Order. Where in the Omnibus Order the Commission opined that the word "bullshitter" "invariably invokes a coarse excretory image," and that the broadcast of this word *was* patently offensive and indecent, "*particularly* during a morning news interview," in the Remand Order the Commission concluded that the *same word* was not "actionably indecent" *precisely because* it was broadcast as part of a news interview. *Compare* Jt. App. 106–07 (emphasis added) *with* Pet. App. 128a.

More fundamentally, although *Golden Globe II* expressly acknowledged that it was changing agency policy, and even though the Omnibus Order also expressly confirmed that *Golden Globe II* had changed the law, the Remand Order dismissed those statements and discovered that the Commission's interpretation had not changed at all. *See* Pet. App. 80a–81a. Based on that revisionist reading of the regulatory history, the Commission affirmed its ear-

lier conclusion that Fox's live broadcasts of the 2002 and 2003 Billboard Music Awards were actionably indecent. *Id.* at 62a.

The Commission also rejected the broadcasters' constitutional challenges to the Commission's indecency determinations. The Commission held that its definition of broadcast indecency was not unconstitutionally vague, notwithstanding this Court's rejection of a materially identical definition of indecency in *Reno v. ACLU*, 521 U.S. 844 (1997). Pet. App. 104a. The Commission also concluded that, under a "relaxed level of First Amendment scrutiny," (*id.* at 105a) its content-based restriction of broadcasters' speech passed constitutional muster. *See id.* at 109a–112a. And while the Commission acknowledged that "[t]he V-chip provides parents with some ability to control their children's access to broadcast programming," it relied on several studies from outside the administrative record to conclude that the V-chip was inadequately effective at limiting children's access to indecent material. *Id.* at 109a, 112a.

3.a. The court of appeals granted the petition for review and vacated the Remand Order. Pet. App. 46a. Accepting the first of the broadcasters' several administrative-law, statutory, and constitutional arguments, the court held that "the Remand Order is arbitrary and capricious because the Commission's regulation of 'fleeting expletives' represents a dramatic change in agency policy without adequate explanation." *Id.* at 18a.

The court of appeals recognized that there were two aspects to the Commission's about-face: First, the Commission changed its view as to the *meaning* of the "F-Word" and the "S-Word"—from a view that evaluated whether the words were used to "depict" or "describe" sexual or excretory activities, to a view

that, "*in any context*," invariably deemed the "F-Word" and the "S-Word" to depict or describe such activity. Pet. App. 31a (quoting *Golden Globe II*, 19 F.C.C.R. 4975, 4978 ¶ 8). Second, the Commission changed its view of the *offensiveness* of the "F-Word" and the "S-Word"—from the view that a single, isolated utterance was very unlikely to rise to the level of "patently offensive," to the view that any use of the word was *presumptively* patently offensive and thus "presumptively indecent." *Id.* at 15a.

The court of appeals rejected the Commission's attempt to explain its new policy on the basis of the purported "difficult[y]" in "distinguish[ing] whether a word is being used as an expletive or as a literal description of sexual or excretory functions." Pet. App. 83a. That "defie[d] any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any 'sexual or excretory' meaning." *Id.* at 29a.

The court of appeals also was not persuaded by the Commission's argument that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" Pet. App. 84a (quoting *Pacifica*, 438 U.S. at 748–49). This failed to explain "why [the Commission] has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*," or why the Commission was willing to "subject[] [viewers] to the same 'first blow'" when it deemed the program to have sufficient social value. *Id.* at 25–27a.[2]

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2 The court of appeals also rejected the "Commission's new approach to profanity," finding it to be "supported by even less

[Footnote continued on next page]

Having concluded "that the FCC's new indecency regime . . . is invalid under the Administrative Procedure Act," the court of appeals did not decide definitively "the various constitutional challenges . . . raised by the Networks." Pet. App. 34a–35a. The "interest of judicial economy" nevertheless compelled the court to state its "skeptic[ism] that the Commission['s] . . . 'fleeting expletive' regime would pass constitutional muster" even if it were adequately explained. *Id.* at 35a. The court of appeals observed that this Court had "struck down as unconstitutionally vague a similarly-worded indecency regulation of the Internet," and expressed "skeptic[ism] that the FCC's identically-worded indecency test could nevertheless provide the requisite clarity to withstand constitutional scrutiny." *Id.* at 37a–38a (citing *Reno*, 521 U.S. at 844).

Moreover, the court of appeals observed that the rationale for reviewing content-based restrictions of broadcasters' speech under a "relaxed" level of scrutiny had eroded in the 30 years since *Pacifica*. Although *Pacifica* had justified the "broadcast is different" strand of First Amendment review on the ground that broadcast television is "uniquely pervasive" and "uniquely accessible to children," (438 U.S. at 748, 749), the court noted that "it is increasingly difficult" to accept this proposition in the technological metropolis of the 21st Century. But even "beyond the mechanistic application of strict scrutiny," the court noted, the fact that "blocking technologies such as the V-chip have empowered viewers to make their

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analysis, reasoned or not," and to reflect an unreasonable construction of the statutory term "profane." Pet. App. 33a, 45a. The Commission does not seek review of those determinations. *See* Pet. 11 n.2.

own choices about what they do, and do not, want to see on television" "may obviate the constitutional legitimacy of the FCC's robust oversight" of broadcast indecency.

b. Judge Leval dissented in part. He rejected the Commission's view that the "S-Word" and other excretory references could be regulated as indecent, reasoning that "censorship" could be justified only by "potential . . . harm to children resulting from indecent broadcasting." Pet. App. 59a n.18. Exposure to the "S-Word," he believed, did not cause that type of harm because "excrement is a main preoccupation of [children's] early years." *Id.* "[R]eferences to sex," on the other hand, did pose a sufficiently serious threat to children to warrant "censorship." *Id.* As to sex, Judge Leval opined that the Commission had provided "a sensible, although not necessarily compelling" rationale for its conclusions that all uses of the "F-Word" are depictions or descriptions of sexual activity and that even a single, fleeting use of that word was presumptively patently offensive. *Id.* at 49a.

INTRODUCTION AND SUMMARY OF ARGUMENT

For 30 years—literally as long as it had sought to police broadcast indecency—the Commission recognized that fleeting utterances of expletives generally fell outside its definition of indecent material. Most expletives, the Commission reasoned, did not depict or describe sexual or excretory activities, and in the rare instance in which the "F-Word" or the "S-Word" was used literally to describe sexual or excretory activity, the fleeting nature of the utterance usually—but not always—compelled a finding that it was not "patently offensive."

In the order under review, the Commission completed a reversal of course it initiated in 2004 and junked that longstanding enforcement policy. Henceforth, *any and every* use of the "F-Word" and the "S-Word" would be deemed to fall within the subject-matter scope of the Commission's indecency definition, and *all* such utterances would be treated as presumptively "patently offensive."

The Commission purported to accomplish this sea change in its indecency enforcement policy without altering in the slightest its definition of indecency. Rather than avowedly revise either the subject-matter scope of the indecency restriction, or the factors relevant to the analysis of "patent offensiveness," the Commission simply announced that the "core meaning" of certain expletives is always and everywhere the same, and adjusted downward to zero the weight it would accord to the second "principal factor" in the "patent offensiveness" analysis—"whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities." It was by these artifices that the Commission brought within its indecency definition speech that it had repeatedly held *not* indecent.

In the future, a fleeting expletive would avoid the Commission's sanction *only* if the Commissioners' *ad hoc* consideration of the expletive's "context" led them to conclude that the expletive had "artistic merit," or some other redeeming social value that made it not "patently offensive." In other words, whether an expletive is to be sanctioned as indecent would turn exclusively on the subjective value that the Commissioners placed on its *content*. Not surprisingly, this new enforcement rubric has produced capricious results that reflect more the Commission-

ers' individual tastes than any identifiable or judicially manageable standard of indecency.

I. The Commission's enforcement regime violates broadcasters' rights under the First Amendment. The Commission's definition of broadcast indecency—which purports to interpret and enforce a *criminal* statute, 18 U.S.C. § 1464—is virtually identical to the definition of indecency, found in the Communications Decency Act, that this Court struck down as unconstitutionally vague in *Reno*, 521 U.S. at 844. Indeed, the broadcasters' case for vagueness is even stronger than the pre-enforcement challenge in *Reno*: Where, in *Reno*, this Court invalidated the CDA's definition of indecency because it *invited* arbitrary enforcement and *threatened* to chill protected speech, here, broadcasters can point to four years' worth of *actual* arbitrary enforcement efforts that have *actually* chilled protected broadcast speech.

Moreover, the Commission's proscription of the broadcast of fleeting expletives is an invalid content-based restriction. The Commission asserts that broadcasting remains subject to intermediate scrutiny, but the decades-old rationales for diminished scrutiny—that over-the-air broadcasting is *unique* in its pervasiveness and accessibility to children, or that broadcast spectrum is scarce—were long ago overtaken by technological developments. Even under intermediate scrutiny, however, the restriction must fail: While the government may have a substantial interest in protecting children from pornography, and even the "verbal shock treatment" of *Pacifica*, this Court has never before held—and the Commission has not attempted to prove—that a fleeting utterance of an expletive poses a similar type of threat to the well-being of children. What is more, in view of the universal availability of targeted blocking technologies such as the V-chip, the Commis-

sion's indecency regime is not a permissible, targeted means for furthering that interest.

Lacking any persuasive response to the broadcasters' constitutional arguments—which were, at the Commission's insistence, pressed and passed upon below—the Commission asserts that the broadcasters cannot raise them in this Court because the broadcasters did not file a cross-petition raising constitutional questions. But the broadcasters do not seek to alter the Second Circuit's judgment; the court granted them all the relief their petition for review requested. More importantly, if the Commission's petition does not encompass those constitutional questions, then the petition raises only an alleged error in the application of clearly established administrative-law precedent—a question the petition itself repeatedly conceded did not warrant review. If the question the Commission presented to the Court is, in fact, not presented, this Court should dismiss the writ of certiorari as improvidently granted.

II. While this Court cannot reverse the judgment of the court of appeals, as the Commission urges, without departing from fundamental principles of First Amendment law, the Court can—and should—affirm the judgment below on the elementary ground found by the Second Circuit: The Commission proffered no reasonable explanation either for its change in view as to the "core meaning" of the "F-Word" and the "S-Word" or for its decision to accord effectively *no weight* to what *the Commission* says is a "principal factor" in analyzing whether a depiction or description of sexual or excretory activity is patently offensive. Indeed, in the order on review, the Commission denied—preposterously—that its indecency policy had changed at all. This is not the forthright grappling with agency precedent that the Administrative Procedure Act ("APA") requires.

ARGUMENT

I. THE REMAND ORDER VIOLATES THE FIRST AMENDMENT

As the prevailing parties in the court of appeals, respondents are entitled to defend the judgment of that court on any basis properly raised below. Before the Second Circuit, the broadcasters raised numerous arguments that the Remand Order violated their First Amendment rights, *see* Pet. App. 18a, and at least two of those arguments compel affirmance of the judgment below: First, the Commission's revised definition of indecency is unconstitutionally vague. Second, even if the Remand Order identifies with adequate precision the speech it proscribes, it is an invalid content-based restriction of broadcasters' speech.

A. The Broadcasters' First Amendment Arguments Are Properly Before This Court

The Commission contends that the Second Circuit's discussion of the broadcasters' constitutional challenges was merely "dicta," and that, because the broadcasters did not file a cross-petition to review those dicta, they "are precluded from raising their constitutional challenges in this Court." FCC Br. 42, 43. Like so much else in the Commission's indecency enforcement efforts, this amounts to a startling reversal of position. This Court should not countenance the Commission's latest bait-and-switch.

1. When the broadcasters first petitioned for review of the Omnibus Order, the Commission sought and obtained a voluntary remand specifically so that it could address the broadcasters' "constitutional and statutory challenges to the indecency findings." Mot. for Voluntary Remand at 4. After those challenges were "fully briefed" and argued, the Second Circuit

addressed those challenges on the merits in the "interest of judicial economy"—that is, to guide the Commission on remand—not as an interesting aside. Pet. App. 35a. Although the court of appeals "refrained" from a definitive ruling on the broadcasters' constitutional challenges, it nevertheless made clear its view that the Commission's indecency enforcement regime was "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague," *id.* at 36a, and otherwise inconsistent with the First Amendment's strict limitations on content-based restrictions of speech. *See id.* at 39a–43a.

Indeed, when it was seeking this Court's review, the Commission *conceded* that this case would not meet certiorari standards apart from the need to consider the Second Circuit's constitutional analysis, because—as the Commission *then* saw it—that analysis had "effectively nullifie[d] the prohibition on indecent language" (Pet. 29) rendering the remand for additional explanation illusory. *See also* Pet. 15 ("a remand to an agency for a fuller explanation of a policy would not merit this Court's review"). And consistent with that view, the Commission presented a question that was not limited to whether the Commission had provided an adequate explanation for its change in policy. *Id.* at I.

Now that it has *obtained* review, the Commission has changed its tune (again), insisting that this case turns only on "the application of well-settled principles of administrative law" and that this Court may not even consider respondents' constitutional arguments. FCC Br. 20. If the Commission's "question presented," in fact, is not presented, then the proper course is for this Court to dismiss the writ of certiorari as improvidently granted. *See Belcher v. Stengel*, 429 U.S. 118, 119 (1976) (per curiam) (dis-

missal appropriate when, after briefing, "it appears that the question framed in the petition for certiorari is not in fact presented by the record").

2. The Commission's contention that the absence of a cross-petition bars respondents from raising their First Amendment arguments in this Court also fails on its own terms.

a. "[A] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Forney v. Apfel*, 524 U.S. 266, 271 (1998) (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980)). Nor may prevailing parties appeal dicta that displeases them. *See Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 99 n.6 (1954). Accordingly, a prevailing party may cross-petition for certiorari only when it "seeks to alter the judgment below" with respect to an "issue on which it was a judgment *loser*." *Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364, 365 (1994).

When a "party seeks to preserve, and not to change, the judgment," a prevailing party "need not cross-petition"; it may "defend [that] judgment on any ground properly raised below." *Nw. Airlines*, 510 U.S. at 364. Simply substituting one legal basis for a judgment below for another—affirming, for example, a judgment on constitutional, rather than statutory grounds—will not modify the judgment so as to require a cross-petition. *See Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982) (rejecting "novel view" that an affirmance that "rests on a different legal basis than the court below adopted" somehow "'modifies' the judgment" so as to require a cross-petition).

b. The Commission contends that acceptance of the broadcasters' constitutional challenges would give them "broader relief," because it would change

the terms of the Second Circuit's remand—from one "aimed at" curing administrative-law deficiencies, to one "aimed at" curing constitutional defects—and thereby further constrain the Commission's regulatory options while expanding the broadcasters' range of permissible speech. FCC Br. 43. This argument fails for two reasons.

First, the fact that an alternative ground for a judgment may enlarge the respondent's options in subsequent proceedings does not alter the *judgment*. When the government was the respondent in *Jones v. United States*, 527 U.S. 373 (1999), it defended the judgment of the Fifth Circuit—which had found constitutional sentencing error, but held the error harmless—on the alternative ground that there was no constitutional error at all. *Id.* at 396–97 (plurality op.). Even though the government's alternative argument indisputably sought to enlarge the government's range of permissible conduct in subsequent proceedings, a plurality of this Court found that argument "properly presented" in the absence of a cross-petition because it did not expand the government's *relief* beyond that which had been awarded below—affirmance of the defendant's sentence. *Id.* Here, as in *Jones*, the court of appeals granted to respondents all the relief they had requested. *Compare* C.A. Jt. App. 2 (requesting that court "hold unlawful and set aside" the Remand Order) *with* Pet. App. 34a (granting the petition for review and vacating the Remand Order as "invalid") *with Forney*, 524 U.S. at 271 (holding that petitioner was aggrieved by order that had "give[n] petitioner some, but not all, of the relief she requested"). The adoption of an alternative ground that is in some sense more favor-

able to the respondent does not suffice to alter the *judgment* and require a cross-petition.[3]

Second, the Commission brought this case to the Court on the strength of its representation that the Second Circuit's opinion—particularly its lengthy discussion of the constitutional flaws in the Commission's new approach—did much more than simply remand the case so that the Commission could comply with this or that administrative-law nicety. The Commission complained bitterly that the Second Circuit's constitutional analysis—offered "in the interest of judicial economy," Pet. App. 35a—had "effectively invalidat[ed] much of the Commission's authority to enforce 18 U.S.C. 1464" and transformed the administrative-law remand into a "Sisyphean errand" the outcome of which was preordained. Pet. 15. On this view, a decision from this Court holding that the Commission's indecency determinations violated the First Amendment would not alter even the terms of the Second Circuit's remand as described to this Court *by the Commission itself*.

If, as this Court has stated, the central purpose of the cross-appeal requirement is to "put[] opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not," and thereby advance "the orderly functioning of the judicial system," *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 481–82 (1999), that purpose compels rejection of the Commission's effort to forestall the very review that it invited.

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[3] Indeed, because virtually all remands to agencies are "'for further proceedings in accordance with' the court's opinion," FCC Br. 43, if the Commission were correct, then a respondent could never (without filing a cross-petition) suggest an alternative basis for a vacatur of agency action because any such alternative defense inevitably would alter the terms of the remand.

B. The Indecency Definition Applied In The Remand Order Is Impermissibly Vague

Time and again, this Court has held that vague and indeterminate content-based restrictions on speech violate the First Amendment. *See, e.g.*, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1991). Imprecise restrictions on the content of speech inevitably chill large amounts of protected speech by requiring speakers to "steer far wide[] of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). These concerns are especially acute when, as here, violations of the restrictions at issue may be punished criminally.[4]

The Commission's definition of "indecency" under 18 U.S.C. § 1464 cannot remotely meet constitutional standards, either facially or in its application. This Court's decision in *Reno*, 521 U.S. at 844, establishes that the Commission's definition of "broadcast indecency" is impermissibly vague on its face. It is also vague as applied: The Commission's befuddling enforcement policy has become even more indeterminate over time as the Commission has turned away from its precedents and increasingly (if not exclusively) toward the Commissioners' individual subjective evaluations of "artistic merit." Pet. App. 76a n.44, 120a n.191. With the Commission now threatening broadcasters with a fine of up to $325,000 *per licensee* for each violation of its indiscernible policy, the unconstitutional chill on broadcasters' speech is palpable.

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[4] Section 1464 is a criminal statute and, as such, it must be strictly construed, even in non-criminal cases, for "[t]here cannot be one interpretation for the Federal Communications Commission and another for the Department of Justice." *FCC v. ABC*, 347 U.S. 284, 296 (1954).

1. As the D.C. Circuit has recognized, "the [*Pacifica*] Court did not address, specifically, whether the FCC's definition [of indecency] was on its face unconstitutionally vague." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) (Ginsburg, R.B., J.). *Reno*, however, compels the conclusion that it is.[5]

In *Reno*, this Court struck down as unconstitutionally vague an indecency standard in the Communications Decency Act ("CDA") that was materially *identical* to that employed by the Commission. The CDA proscribed as indecent "any . . . communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Reno*, 521 U.S. at 860 (quoting 47 U.S.C. § 223(d)(1)(B) (Supp. 1994)). That definition is virtually identical to the two-step definition employed by the Commission in this case: "First . . . the material must describe or depict sexual or excretory organs or activities. Second, the material must be patently offensive as measured by contemporary community standards." Pet. App. 71a–72a. The Commission's definition, like the CDA's, even emphasizes the importance of "context." *Id.* at 72a.

This Court found the CDA's indecency definition was plagued with "uncertainty" and full of terms

[5] The notion, advanced by the Commission in the court of appeals, that respondents may not assert a vagueness challenge because Fox's broadcasts were "clearly proscribed," is spurious. *See* FCC C.A. Br. 68 (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). *Hoffman Estates* itself recognizes that its estoppel rule does not apply to "vagueness challenges" that "involve First Amendment freedoms." 455 U.S. at 495 n.7 (alteration omitted). Moreover, whether Fox's broadcasts are "proscribed" at all is the central issue in the case.

that lacked "any textual embellishment at all" or were barely explained. *Reno*, 521 U.S. at 871 & n.35. Concluding its indeterminacy would have had an "obvious chilling effect on free speech," the Court struck down the standard as "lack[ing] the precision that the First Amendment requires when a statute regulates the content of speech." *Id.* at 872, 874. The Commission complains that a "precise description of indecency . . . is unattainable," FCC C.A. Br. 71, but it otherwise has no persuasive answer to *Reno*.

Below, the Commission strained to distinguish *Reno* on the ground that it was an "Internet" case. FCC C.A. Br. 68. But that distinction makes no sense: There is no reason why the "medium" should matter in a *vagueness* inquiry. Either a standard provides sufficient notice and clarity to those bound to abide by it, or it does not. *Reno*'s evaluation (and invalidation) of what is, in fact, *the Commission's* indecency standard applies with equal force here, regardless of the fact that *Reno* is an "Internet" case and not a "broadcast" case.

The Commission also argued that the "administrative guidance" it has published—specifically, its explication of the three "principal factors" relevant to "patent offensiveness" (*Industry Guidance*, 16 F.C.C.R. at 8003 ¶¶ 9, 10)—"gives further content to [its] definition of indecency" and "ha[s] reduced any vagueness inherent" in its definition. FCC C.A. Br. 69, 70. But that is wrong for two reasons.

First, the Commission's guidance does not limit the subject-matter scope of the indecency definition—*i.e.*, the sexual or excretory organs or activities subject to the policy. In *Reno*, this Court concluded that a clear and discernible limitation on the subject-matter scope of the definition of indecency was

"critical" to "reduc[ing] the vagueness inherent in the open-ended term 'patently offensive.'" 521 U.S. at 873. The Court observed that the definition of obscenity in *Miller v. California*, 413 U.S. 15 (1973), included a "critical requirement" that the "proscribed material be specifically defined by the applicable state law." *Reno*, 521 U.S. at 873 (internal quotation marks omitted). That requirement—or any similar subject-matter limitation—was "omitted from the CDA," and it is missing from the Commission's definition as well. *Id.*

Second, under the Commission's standard as under the CDA, offensiveness is "measured by contemporary community standards." Pet. App. 72a. The Commission purports to intuit those standards from the mere fact that it exists and meets people—or as the Commission would have it, "constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens." *Id.* at 86a. But whether those standards are derived from the agency's (externally unknowable) Cartesian self-awareness, or, more likely, from a blizzard of "viewer complaints" that are computer-generated by a narrow ideological group determined to impose its own standards on the broader community, the question "whether material is 'patently offensive' according to community standards . . . [is] essentially one[] of *fact*." *Reno*, 521 U.S. at 873–74. In *Reno*, this Court concluded that the CDA's exclusive reliance on that *factual* inquiry precluded "appellate courts [from] impos[ing] some limitations and regularity on the definition . . . *as a matter of law*" and thus placed no effective limit on the indecency definition's "uncertain sweep." *Id.* at 873 (emphasis added). The Commission's definition suffers from the same fatal flaw, presenting the same grave "threat of censoring speech that, in fact, falls outside [its] scope," and

"silenc[ing] some speakers whose messages would be entitled to constitutional protection." *Id.* at 874.

2. Vague on its face, the Commission's indecency standard is even less determinate in application. Problems emerge first in the Commission's mechanism for selecting the broadcasts it will investigate. As the Commission itself has explained, it "does not independently monitor broadcasts for indecent material." *Industry Guidance*, 16 F.C.C.R. at 8015 ¶ 24. It instead relies exclusively upon "complaints of indecent broadcasting received from the public." *Id.* And the Commission has persisted stubbornly in its reliance on these so-called "viewer complaints" even though an irrefutable body of evidence demonstrates that the vast majority of these "complaints" are computer-generated by advocacy groups such as the Parents Television Council and forwarded by individuals who never viewed the broadcast alleged to be indecent. *See, e.g.*, Pet. App. 129a–130a & nn. 217–23.

This Court has "found governmental grants of power to private actors constitutionally problematic" when "the regulations allowed a single, private actor to unilaterally silence a speaker even as to willing listeners." *Hill v. Colorado*, 530 U.S. 703, 734 n.43 (2000). That is precisely what the Commission's enforcement policy accomplishes here. The indeterminate definition of "indecency," coupled with abdication of enforcement to advocacy groups, confers "broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech." *Reno*, 521 U.S. at 880. Moreover, the Commission, when determining whether material is patently offensive, relies on its effect on the audience, according weight to the "strong feelings" that "complainants . . . express[]." Pet. App. 77a. That obviously compounds the heckler's veto problem created by the Commis-

sion's delegation of its enforcement authority to activists. *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) ("Speech cannot be . . . punished or banned . . . simply because it might offend a hostile mob"); *see also Ashcroft v. ACLU*, 542 U.S. 656, 674 (2004) (Stevens, J., concurring) ("the Government may not penalize speakers for making available to the general . . . audience that which the least tolerant communities in America deem unfit for their children's consumption").

The bizarre and irreconcilable outcomes produced by this complaint-driven enforcement policy only amplify the inherent vagueness of the Commission's indecency standard. *Reno*, 521 U.S. at 870. When dozens of expletives—"fuck" and "'shit' and [their] variations"—were sprinkled through a three-and-a-half hour broadcast of *Saving Private Ryan*, the Commission concluded that the expletives were "neither gratuitous nor in any way intended or used to pander, titillate or shock," but instead portrayed "power, realism and immediacy" and were "[e]ssential to the ability of the filmmaker to convey" the "horrors of war," and thus were not patently offensive. *In re Complaints Against Various Television Licensees Regarding Their Broad. of "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4512–13 ¶¶ 13, 14 (2005). But when the identical words were uttered by blues musicians in a Martin Scorsese-produced PBS documentary about the blues, the Commission tersely rejected the argument that the "vulgar, explicit, graphic, . . . and shocking" language was "essential," holding that the *Saving Private Ryan* exception would operate only in unelaborated "unusual circumstances" that were somehow "not present here." Jt. App. 75 ¶ 82. Yet, if those very same expletives were uttered by "a wire-tapped organized-crime figure on a news program," the "unusual circum-

stances" apparently would resurface and the expletives would revert to a non-patently-offensive character. FCC Br. 18.

The Commission's flip-flopping is not limited simply to expletives: When a broadcast of *NYPD Blue* contained brief glimpses of a female actor's naked buttocks, the Commission found it "shocking" and patently offensive. *See In re Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue,"* 23 F.C.C.R. 3147, 3154 ¶ 16 (2008). But when a broadcast of the film *Schindler's List* included a depiction of *full frontal nudity*, the scene was "disturbing," (*id.* at 3154 ¶ 17) but not "shocking," and thus not "patently offensive." *WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, 1841 ¶ 9 (2000).

The Commission cannot reconcile these outcomes by invoking its allegiance to "context," because the *Remand Order* itself makes clear that the Commission cannot make up its *own* mind about the *contexts* that will transform a fleeting expletive into patently offensive indecent material. In the Remand Order, the Commission concluded that the broadcast of the word "bullshitter" was not indecent because it occurred in the context of a "news interview." Pet. App. 128a. But just months earlier, the Commission had found the identical broadcast to be "shocking and gratuitous" and thus patently offensive *precisely because* it occurred in the context of a "news interview." Jt. App. 107. The Commission's invocation of "context" does not cure the vagueness of the Commission's standard.

Though the Commission "emphatically" denies it, Pet. App. 86a, it seems clear that the Commission's findings of patent offensiveness turn more on the individual Commissioners' particular *tastes*—their

evaluations of the "artistic merit" or "necess[ity]" of the material alleged by activist groups to be indecent, *id.* at 76a n.44, 120a n.191—than on any objective or verifiable analysis of whether the material "panders to, titillates or shocks the audience." *Id.* at 72a. Steven Spielberg evidently appeals to a majority of the current Commissioners; Martin Scorsese does not. But, as this Court has recognized, such an approach to content regulation is antithetical to the First Amendment: "[E]sthetic and moral judgments about art and literature" are "for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). And it is precisely this type of arbitrary and "discriminatory enforcement," *Reno*, 521 U.S. at 872, based on "wholly subjective judgments," *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008), that the vagueness doctrine seeks to curtail.

Under the Commission's indecency regime—where an "F-Word" uttered by a blues musician is indecent, and the same "F-Word" uttered by a soldier or gangster is not, where a glimpse of bare buttocks is indecent, but full frontal nudity is not, and where an "S-Word" uttered in the course of an interview of a reality-show contestant is indecent one day and not the next—it is impossible for broadcasters to reliably predict what the Commission will find indecent and what it will not. Broadcasters cannot possibly preordain whether individual Commissioners will protect a program's message as a "matter of public importance," or impose sanctions because its content was "communicative" but not "essential," Jt. App. 84; nor have they the powers of clairvoyance necessary to determine whether the Commission will faithfully apply its precedent or limit that precedent to unspecified "unusual circumstances." It is not merely

that, under the Commission's indecency standard, it is "difficult to determine whether the incriminating fact it establishes has been proved"; rather, it suffers from a fatal "indeterminacy of precisely what that fact is." *Williams*, 128 S. Ct. at 1846. And that indeterminacy renders the Commission's standard impermissibly vague.

3. There can be no doubt that the Commission's unfathomable enforcement regime chills broadcasters' protected speech. Indeed, in the court of appeals, the Commission did not deny the fact, arguing only that it does not do so "unduly." FCC C.A. Br. 75. But whether it does so "unduly" is for this Court—not the Commission—to determine. Thirty years ago, Justices of this Court found no likelihood of an "undue 'chilling' effect" on broadcasters' speech principally because the Commission promised that it would "proceed cautiously" in policing indecency—as exemplified by the "verbal shock treatment" that, by the narrowest of margins, had been sanctioned in that case. *Pacifica*, 438 U.S. at 762 n.4 (Powell, J., concurring). But the Commission now has abandoned any pretense of a "cautious[]" enforcement regime, and as it has done so, the chill on broadcasters' speech has deepened.

Perhaps the most dramatic display of this chilling effect involves *Saving Private Ryan*—material that the Commission has specifically held *not* indecent. On Veterans' Day 2004, dozens of ABC affiliates refused to air the network's unedited broadcast of that film, even though the network had shown the same film in 2001 and 2002. John Eggerton & Allison Romano, *Pre-Empting Private Ryan*, BROAD. & CABLE (Nov. 10, 2004). Similarly, in September 2006, many CBS affiliates delayed or elected not to broadcast the Peabody Award-winning documentary *9/11* because

of concerns over language used by firefighters, even when the program had "aired twice without controversy" on the network in 2002—before the Commission's about-face in *Golden Globe II*. Larry Neumeister, *Some CBS Affiliates Worry over 9/11 Show*, ASSOCIATED PRESS (Sept. 3, 2006) (noting an activist group's effort to "read[y] its 3 million members to flood the FCC and CBS with complaints").

The chill cast by the Commission's regulation of fleeting expletives is particularly invidious for live programming—be it news, sports, or entertainment. For respondents, this is not merely a matter of conjecture: The Commission has pending several investigations concerning NBC broadcasts of expletives during live sporting events. For example, after nearly four years, the Commission still has yet to close its investigation of NBC's live broadcast of the USA-versus-China women's volleyball game in the 2004 Summer Olympic Games from Athens, Greece, for an American player's supposed utterance of the "F-Word" (picked up by a courtside microphone) after misplaying a ball when the U.S. team was trailing, 21–20, in a crucial game. *See* C.A. Jt. App. 271. The Commission initiated an inquiry notwithstanding the fact that exactly *none* of the 41.34 million of that day's actual Olympics viewers lodged a complaint about that utterance. *Id.* at 278–79.[6]

To be sure, this and other "letters of inquiry" do not constitute final agency action. Now that we are on the eve of the *2008* Summer Olympics, the Commission, after more than three years of "careful re-

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[6] *See also* C.A. Jt. App. 222 (response to FCC letter of inquiry concerning NBC's 2004 live broadcast of an interview of a college football player who, after leading his team to a come-from-behind victory over heavily favored Notre Dame, said, "I'm so fucking proud of this football team").

view," ultimately may take no action against NBC for these broadcasts. But neither are they irrelevant to the legal issue before this Court, even if the Commission *ultimately* takes no action: Insofar as these "letters of inquiry" arrive with the threat of fines of up to $325,000 per utterance per licensee, *see* 47 U.S.C. § 503(b)(2)(C)(ii), and the implicit threat of criminal prosecution, even the initiation of an *investigation* is sufficient to cause broadcasters to restrict their expression "to that which is unquestionably safe." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). And if well-meaning, well-intentioned people in the broadcast industry simply cannot ascertain whether *Saving Private Ryan*, a 9/11 documentary, a blues documentary, or even the Olympic Games are "unquestionably safe," the chilling effect generated by that indeterminacy is, under any conceivable measure worthy of our society, undue.[7]

C. The Remand Order Fails Any Standard Of Scrutiny Appropriate To Restrictions Of Broadcast Content

This Court generally applies "the most exacting scrutiny" to content-based restrictions on speech, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994), presuming any such restriction to be invalid

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[7] Citing this Court's decision in *Alexander v. United States*, 509 U.S. 544, 555–58 (1993), the Commission below dismissed the chilling effect posed by its fines, arguing that "nothing in the Constitution precludes the government from imposing penalties that are sufficient to deter violations of law, even where expression is concerned." FCC C.A. Br. 78. If this were true, then no chilling effect on expressive activity—no matter how great—would violate speakers' First Amendment rights. That, of course, is not the law, *see, e.g.*, *Reno*, 521 U.S. at 872, and *Alexander*, which involved only penalties for marketing unprotected *obscene* materials, does not stand for so extreme a proposition.

and requiring that the government prove that the restriction is the least restrictive means to achieve a compelling state interest. This standard applies to content restrictions of cable and satellite television, *see Playboy*, 529 U.S. at 813, the Internet, *see Reno*, 521 U.S. at 874, and communications by telephone, *see Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989), not to mention outdoor movie theaters, *see Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 (1975), and newspapers, *see Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

The Commission, however, contends that over-the-air broadcasting—alone among all modern channels of communication—is entitled only to "the most limited First Amendment protection." FCC C.A. Br. 57. Invoking this Court's decisions in *Pacifica* and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Commission asserts that restrictions on broadcast content need only be "narrowly tailored" to some "substantial" governmental interest. FCC C.A. Br. 58 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984)). Decades have passed, though, since this Court decided *Pacifica* and *Red Lion*, and technologies achieved in the intervening years have completely eroded the empirical underpinnings of those decisions and, with them, any sound basis for continuing to apply a "more relaxed standard of scrutiny" to restrictions on broadcast content. *Turner*, 512 U.S. at 639.

But whether "exacting" or "relaxed" scrutiny applies to the Remand Order, it cannot survive. Under either standard, "the Government bears the burden of proving" both the weight of its asserted interest and that its content restriction is adequately tailored to that interest in view of available less restrictive alternatives. *Playboy*, 529 U.S. at 816; *see also*

Ashcroft, 542 U.S. at 665. It can do neither here. This Court has never held that an isolated utterance of an expletive is the type of material that warrants direct government regulation. All that is vulgar is not indecent. Indeed, "one man's vulgarity" may be "another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). In any event, in view of the universal availability of parental controls such as the V-chip, the Commission's direct proscription of such speech—shutting a broadcaster's speech off at its source—is not remotely "narrowly tailored" to its asserted interest.

1. There Is No Longer A Sound Basis For According Relaxed Scrutiny To Content-Based Restrictions Of Broadcast Speech

To justify the application of a diminished scrutiny to its content restriction, the Commission points to physical attributes supposedly "unique" to the broadcast medium. FCC C.A. Br. 58. Quoting this Court's 1978 decision in *Pacifica*, the Commission argues that the broadcast medium has "established a uniquely pervasive presence," and is "uniquely accessible to children." *Id.* at 57 (quoting 438 U.S. at 748, 749). And invoking *Red Lion*'s much-criticized "scarcity rationale," the Commission also posits that the broadcast medium is unique in that "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Id.* at 58 (quoting 395 U.S. at 388). Whatever validity these rationales may have had when this Court articulated them decades ago, they rest today on moth-eaten foundations and can no longer support the "relaxed" scrutiny on which the Commission's content restrictions have historically depended.

1. Thirty years after *Pacifica*, it can no longer be said that, of all channels of communication, broadcasting is "*uniquely* pervasive" or "*uniquely* accessible to children." 438 U.S. at 748, 749 (emphases added). Already 12 years ago, a four-Justice plurality of this Court concluded that cable television was as "pervasive" and "as 'accessible to children' as over-the-air broadcasting, if not more so." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 744, 745 (1996) (plurality op.) ("*DAETC*").[8]

In the 12 years since *DAETC*, over-the-air broadcasting has become ever less "uniquely pervasive." The Remand Order itself acknowledges that, in 2005, *86 percent* of television households subscribed to cable or satellite service.[9] Pet. App. 106a–107a. Meanwhile, the Internet has also assumed a central role in the delivery of content to American homes. The Commission recently reported that (as of June 2007) more than 99 percent of households had access

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[8] Indeed, if one includes the three Justices who rejected the historical "distinctions between media" as "dubious from their infancy," *DAETC*, 518 U.S. at 813 (Thomas, J., concurring in the judgment in part, dissenting in part), not just four, but *seven* Justices disapproved treating over-the-air broadcasting differently from cable and satellite broadcasting.

[9] The Commission's data dates to 2005 and is set forth in its *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 F.C.C.R. 2503 (2006). Perhaps coincidentally, perhaps not, the Commission has failed to issue any subsequent assessment of competition in the video marketplace since the broadcasters filed their petitions for review, notwithstanding a statutory mandate that it make such reports to Congress "*annually*." 47 U.S.C. § 548(g) (emphasis added). Analyzing May 2008 data, Neilsen Media Research found that 89.5 percent of television households subscribed to cable or satellite service. *See* Katy Bachman, Satellite TV Continues to Bite into Wired Cable, *MediaWeek* (June 11, 2008).

to high-speed Internet service, and that more than *65.9 million* households actually used high-speed Internet service.[10] As Commission staff has put it, "what is pervasive today is hundreds of channels and billions of web pages," and "the invasion leaves most American households not anxious, but indifferent." John W. Berresford, Federal Communications Commission, Media Bureau Staff Research Paper: The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed 29 (2005).

Still, the Commission observes that, even if nine-tenths of all households receive their television service from a cable or satellite provider, "that still leaves millions of households that rely exclusively on over-the-air broadcasting." FCC C.A. Br. 59. (The Commission assumes, apparently, that households that do not subscribe to cable or satellite television service also lack access to the Internet.) But the Commission overlooks the fact that *only one-third* of American households include children under 18.[11] If only 14 percent of all households rely solely on broadcast television for real-time programming, and only one-third of those households will include children under 18, that means the Commission's content regulation thus remains relevant to, at the very most, *five percent* of American households. The Commission thus is reduced to claiming that broadcasting is "uniquely pervasive" because this small percentage of Americans is "hardly . . . inconsequen-

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10 *See* Federal Communications Commission, *High-Speed Services for Internet Access: Status as of June 30, 2007*, at 3, 4 (Mar. 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf (last visited July 31, 2008).

11 *See* U.S. Census Bureau, *Selected Social Characteristics in the United States: 2006*, available at http://factfinder.census.gov (last visited July 31, 2008).

tial." Pet. App. 107a. Broadcast television, like other content in our media-driven age, may be "pervasive," but in 2008, even the Commission has trouble contending that it is "*uniquely*" so.

The nearly 30 years since *Pacifica* have similarly eviscerated the notion that broadcast television is "uniquely accessible to children" when compared to other media. 438 U.S. at 749. Indeed, the availability of alternative media sources is even more pronounced with respect to younger generations than with adults. According to a 2005 report cited by the Commission, *see* Pet. App. 107a–108a & n.154, households with children today are "media saturated." Donald F. Roberts et al., *Generation M: Media in the Lives of 8–18 Year-Olds* 10 (Kaiser Family Found. 2005). Like all media content, broadcast programming is accessible by children to some degree, but certainly it is no longer *uniquely* available when compared to the countless other avenues—cable, satellite, the Internet, mobile phones, iPods, iPhones, the list goes on—through which children up to age 18 receive video and audio content.

Against this background of profound technological change in how people obtain and communicate information in the 21st Century, the Commission's insistence that "*Pacifica*'s premises remain as valid today as they were in 1978," FCC C.A. Br. 61, is simply absurd. The technological and cultural developments of the last 30 years must be accorded doctrinal significance.

2. In its court-of-appeals brief (but not in the *Remand Order* itself) the Commission also relied on the much-criticized "scarcity rationale" to support its continued censorship of the broadcasting medium. *See* FCC C.A. Br. 58 (citing *Red Lion*, 395 U.S. at 388); *see also NBC v. United States*, 319 U.S. 190,

213 (1943) ("the radio spectrum simply is not large enough to accommodate everybody"). The Commission's hasty exhumation of the scarcity rationale represents yet another startling reversal of position. More than 20 years ago, the Commission had buried the doctrine, stating, "we no longer believe that there is scarcity in the number of broadcast outlets available to the public," and that accordingly "the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." *In re Complaint of Syracuse Peace Council Against Television Station WTVH*, 2 F.C.C.R. 5043, 5053, 5054 ¶¶ 65, 74 (1987); *see also General Fairness Obligations of Licensees*, 102 F.C.C.2d 145, 196–211 ¶¶ 81–131 (1985).[12]

That the Commission would bother with the backflip at all is puzzling because *Red Lion* itself recognizes that the scarcity rationale supported only making room for *additional* speech deemed to be in the public interest—not "government *censorship* of a particular program" or other restrictions on the broadcaster's ability to "carry a particular program or to publish his own views." 395 U.S. at 396 (emphasis added); *see also FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 379 n.12 (1984) (if scarcity doc-

12 To be sure, the Commission later repudiated its repudiation of the scarcity rationale, calling its earlier decision "dicta." *In re Repeal of Modification of the Personal Attack and Political Editorial Rules*, 15 F.C.C.R. 19,973, 19,979 ¶ 17 (2000). Even if the Commission's legal conclusion that a unitary standard of scrutiny should apply to print and broadcast media were dictum—which is plainly not the case, *see Syracuse Peace Council*, 2 F.C.C.R. at 5043 ¶ 1—the Commission could not unwind its *factual finding* that there was, in 1987, no "scarcity in the number of broadcast outlets available to the public." *Id.* at 5054 ¶ 74; *see also id.* at 5051 ¶ 55.

trine had "'the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis" for the doctrine (quoting *Red Lion*, 395 U.S. at 393)); *Pacifica*, 438 U.S. at 770 n.4 (Brennan, J., dissenting). Once upon a time, the Commission recognized this limitation on the scarcity rationale as well. *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 11 (1987) ("we no longer consider . . . spectrum scarcity to provide a sufficient basis for [indecency] regulation").

While this Court has not yet found occasion to disavow the rationale, *see Turner*, 512 U.S. at 638 ("we . . . see no reason to do so here"), it has long expressed openness to doing so upon an appropriate showing of changed circumstances. *See CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973) ("the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence"); *League of Women Voters*, 468 U.S. at 377 n.11 (inviting the Commission to send "some signal . . . that technological developments have advanced so far" as to render the scarcity rationale "obsolete").

Whatever its validity when *Red Lion* affirmed it in 1969, or in 1987 when the Commission rejected it without reservation, today the scarcity rationale is totally, surely, and finally defunct. The fact is that, today, "spectrum" is not "scarce." When *Red Lion* was decided in 1969, there were 7411 over-the-air broadcasting stations in the United States. *See* Berresford, *supra*, at 13. In 1987, when the Commission rejected the scarcity rationale as empirically unsupported, there were 10,128. *See Syracuse Peace Council*, 2 F.C.C.R. at 5053 ¶ 67. Today, there are

15,736.[13] Moreover, this explosion of traditional broadcast outlets has been accompanied, recently, by an explosion of new broadcast technologies—satellite television, satellite radio, HD radio, and low power FM, to name a few of the many. And as the Nation transitions from traditional analog broadcasting to digital broadcasting—most analog television broadcasts must cease by February 17, 2009, *see* 47 U.S.C. § 309(j)(14)(A)—broadcasting opportunities are set to redouble once again: Digital broadcasts are "more resistant to interference than analog broadcasts," allowing the Commission to "stack broadcast channels right beside one another along the spectrum," and digital broadcasting moreover allows broadcasters to "multicast"—to deliver as many as six channels of content in their allocated channel of spectrum. *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 293, 294 (D.C. Cir. 2003) (Roberts, J.).

The antiquated notion of spectrum scarcity can no longer serve as a basis for according only "relaxed scrutiny" to content restrictions in the broadcast media. Nor can the outmoded premises of *Pacifica*—that over-the-air broadcasting is "uniquely pervasive" or "uniquely accessible to children." As with any other content-based restriction of speech, the government should be made to demonstrate that the Remand Order serves a compelling state interest and is the least restrictive means available to achieve that interest. It cannot do either.

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[13] Federal Communications Commission, News Release: Broadcast Station Totals as of December 31, 2007 (Mar. 18, 2008), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-280836A1.pdf (last visited July 31, 2008).

2. Isolated Expletives Are Not Constitutionally Indecent Speech

The Commission has pitched much of its approach after *Golden Globe II* on the mere Humpty-Dumpty-worthy *assertion* that the "S-Word" and the "F-Word" always and universally have excretory and sexual meanings, respectively. *Cf. TVA v. Hill*, 437 U.S. 153, 173 n.18 (1978) ("'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what *I* choose it to mean—neither more nor less'" (quoting Through the Looking Glass, in The Complete Works of Lewis Carroll 196 (1939))). But for the Commission to say that a particular word or image falls within its definition of indecency—or for that matter, Congress's—does not itself resolve the question whether that word or image is indecent in the constitutional sense. If the Commission tomorrow declared that the word "armoire" is indecent, that could not itself demonstrate that the government has a compelling state interest in shielding children from exposure to that word. The constitutional category of indecent speech includes only those words or images that have actual capacity to threaten "the physical and psychological well-being of minors," *Sable Commc'ns*, 492 U.S. at 126, and the Commission may not—by mere *ipse dixit*—conclude which words have such an impact.

This Court has tightly limited the constitutional category of indecent speech to patently offensive depictions or descriptions of sexual activity or organs, such as pornographic "'girlie' magazines," *Ginsberg v. New York*, 390 U.S. 629, 631 (1968); "sexually explicit adult programming" that "many adults . . . would find . . . highly offensive," *Playboy*, 529 U.S. at 811; and "pictures of oral sex, bestiality, and rape"—"material that would be offensive enough [to be obscene] *but for* the fact that the material also has 'se-

rious literary, artistic, political or scientific value' or nonprurient purposes." *DAETC*, 518 U.S. at 752 (plurality op.).

On the other hand, this Court has rejected the proposition that *all* displays of nudity are harmful to children and therefore subject to regulation. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (invalidating ordinance that barred exhibition of films containing nudity at outdoor movie theaters). Unless limited to "sexually explicit nudity," the Court held, a ban on displays of nudity could not "be justified by any . . . governmental interest pertaining to minors." *Id.* And, critically for this case, a plurality of the Court (at least) also has rejected the proposition that the government's compelling interest in shielding children from patently offensive sex-related materials extends to "an occasional expletive." *DAETC*, 518 U.S. at 752 (plurality op.) (quoting *Pacifica*, 438 U.S. at 750). Indeed, *Pacifica* itself expressly reserved the question whether "an occasional expletive" could be proscribed as indecent. 438 U.S. at 750.

The 12-minute "Filthy Words" monologue at issue in *Pacifica* was miles away from an "occasional expletive." It contained *100* separate utterances of the "F-Word" or the "S-Word" (an average of one every seven seconds), *see* 438 U.S. at 751–55 (appendix), and, crucially, the broadcaster there "d[id] not dispute" that several of the expletives explicitly "referred to excretory or sexual activities or organs." *Id.* at 739. Nor did the broadcaster "quarrel with the conclusion that this afternoon broadcast was patently offensive." *Id.* Its defense "rest[ed] entirely on the absence of prurient appeal" in the material. *Id.* The broadcaster thus *conceded* that it had broadcast patently offensive depictions of sex. In providing the

decisive fourth and fifth votes to reject the broadcaster's First Amendment challenge, Justices Powell and Blackmun stressed that "the Court's holding . . . does not speak to cases involving the isolated use of a potentially offensive word . . . as distinguished from the verbal shock treatment administered by [Pacifica] here." *Id.* at 760–61 (Powell, J., concurring).

If *Pacifica* did not address whether an "occasional expletive" or the "isolated use of a potentially offensive word" could be regulated as uniquely dangerous to children, *Cohen v. California*, 403 U.S. 15 (1971) and its progeny suggest strongly that it cannot. In *Cohen*, this Court reversed Cohen's conviction for engaging in "offensive conduct" based upon his public display, in a courthouse, of a jacket emblazoned with the words "Fuck the Draft." *Id.* at 16. And similarly, in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), this Court summarily vacated in light of *Cohen* Rosenfeld's conviction of "utter[ing] . . . indecent language in a[] . . . public place," specifically, his utterance of "the adjective '[m]----- f-----' on four different occasions" while speaking at a school board meeting. *Id.* at 910 (Rehnquist, J., dissenting). In the manner used on Cohen's jacket, the Court observed, the "F-Word" was devoid of sexual meaning; it could not "plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted." 403 U.S. at 20.[14] The Court thus rejected

14 Rosenfeld's remarks were similarly devoid of sexual content. "Testimony varied as to what particular nouns were joined with this adjective, but they were said to include teachers, the community, the school system, the school board, the country, the county, and the town." 408 U.S. at 910 (Rehnquist, J., dissenting).

state efforts to "punish[] public utterance of this unseemly expletive in order to maintain what [it] regard[s] as a suitable level of discourse within the body politic." *Id.* at 23. "[G]overnmental officials," the Court wrote, "cannot make principled distinctions in this area." *Id.* at 25.

If, however, there existed a well-established compelling state interest in shielding children from exposure to a "single four-letter expletive," *Cohen*, 403 U.S. at 26—if, as the Commission contends, even isolated expletives "pose to children" risks of harm similar in magnitude to that posed by the pornographic images in *Ginsberg*, the dial-a-porn messages in *Sable*, and the verbal shock treatment in *Pacifica*, FCC Br. 19—then both *Cohen* and *Rosenfeld* would have been decided differently because, in both instances, *the speaker actually exposed children to the expletives*. *See Cohen*, 403 U.S. at 16 ("There were women and children present in the corridor"); *Rosenfeld*, 408 U.S. at 910 (Rehnquist, J., dissenting) ("there were approximately 40 children and 25 women present at the meeting"). If the Commission wishes to expand the category of constitutionally indecent material to sweep in not just patently offensive pornographic materials historically subject to government regulation, but now even isolated utterances of expletives like that at issue in *Cohen*, it is the Commission's burden to "demonstrate that the recited harms are real, not merely conjectural," *Turner*, 512 U.S. at 664, and that they are sufficiently grave as to make the government's alleviation of them a compelling governmental objective. *See Playboy*, 529 U.S. at 819–21; *see also DAETC*, 518 U.S. at 766 (plurality op.) ("In the absence of a factual basis substantiating the harm . . . we cannot assume that the harm exists"). Yet, as the Second Circuit observed, the Remand Order is "devoid of any

evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation," Pet. App. 32a, and the Commission does not dispute that conclusion here.[15]

3. The Commission Has Failed To Demonstrate That Targeted Blocking Of Indecent Broadcasts Cannot Achieve The Commission's Asserted Goal Of Protecting Children From Indecent Material

"[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Playboy*, 529 U.S. at 814. Where "a less restrictive means is available for the Government to achieve its goals, the Government *must* use it." *Id.* at 815 (emphasis added). "[T]argeted blocking" of illicit speech "is less restrictive than banning," and, accordingly, "the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests." *Id.*

The "V-chip," since 2000 included by statutory mandate in every television larger than 13 inches (*see* 47 U.S.C. § 303(x)), allows parents to review program ratings and to block, in a targeted manner, the broadcast content they deem inappropriate for their

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15 The Commission answers that its "duty is to enforce the statute that Congress enacted, not to second-guess the evidentiary basis for its enactment." FCC Br. 19. But 18 U.S.C. § 1464, which, as a criminal statute, "is not administered by any agency but by the courts," *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring), does not answer whether isolated expletives are actually "indecent" much less whether Congress could constitutionally make them so.

children. *See DAETC*, 518 U.S. at 756 ("manufacturers, in the future, will have to make television sets with a so-called 'V-chip'—a device that will be able automatically to identify and block sexually explicit or violent programs"). To enhance parental authority over their children's broadcast television consumption, the FCC joined with the broadcast and cable industries to develop a user-friendly rating system that identifies, in a manner that both parents and the V-chip can understand, "video programming that contains sexual . . . or other indecent material." *In re Implementation of Section 551 of the Telecommunications Act of 1996*, 13 F.C.C.R. 8232, 8232 (1998). To block unwanted content, a parent need only program her television's V-chip to block signals bearing the program ratings she deems inappropriate for her children's viewing.[16]

The broadcasters having proffered, in the V-chip and program ratings, a method of targeted blocking that is less restrictive than direct regulation, "the burden is on the Government to prove that the proposed alternatives will not be as effective as [direct regulation]." *Ashcroft*, 542 U.S. at 665. The Commission allows that "[t]he V-chip provides parents with some ability to control their children's access to broadcast programming," Pet. App. 109a, but claims to have "identified several serious limitations on the effectiveness of the V-chip." FCC C.A. Br. 73. Its contentions, however, cannot bear the government's "constitutional burden of pro[ving]" that "speech is

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16 *See* FCC, News Release: Commission Finds Industry Video Programming Ratings System Acceptable; Adopts Technical Requirements to Enable Blocking of Video Programming (Mar. 12, 1998) available at http://www.fcc.gov/Bureaus/Cable/News_Releases/1998/nrcb8003.html (last visited July 31, 2008).

restricted no further than necessary to achieve [its] goal." *Ashcroft*, 542 U.S. at 660, 666.

First, the Commission argued that "most televisions do not contain a V-chip, and most parents . . . do not know how to use," or are otherwise unwilling to use, the V-chip. Pet. App. 109a. That statement, which was supported principally by a *2003* study which itself relied on data—specifically, a small survey of 150 Philadelphia families—collected in *2000* (the year Congress's V-chip mandate became effective), certainly was erroneous at the time the Commission made it in November *2006*.[17] But even if it were true—and it is not—it could not demonstrate that the V-chip is an ineffective alternative to direct suppression of speech. This Court rejected a substantially identical "list of practical difficulties" in *DAETC*, and concluded that the difficulties called "not for [direct regulation], but, rather, for informational requirements." 518 U.S. at 759 (majority op.). And in *Ashcroft*, this Court held the *commercial*

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[17] *Compare* Pet. App. 109a n.159 (citing Annenberg Public Policy Center, *Parents Use of the V-Chip to Supervise Children's Television Use* 3 (2003)) *with* NBC C.A. Br. 61, 62 (citing *2007* data demonstrating that approximately 70 percent of the 285 million televisions then in use contained a V-chip and a 2004 survey revealing that 89 percent of parents who had used the V-chip found it "somewhat useful" or "very useful"). Moreover, just months from now, when analog television broadcasts are scheduled to end, *virtually every television capable of receiving over-the-air broadcasts will be equipped with a V-chip.* To receive digital broadcasts, a consumer needs either a television that includes a digital tuner or a set-top digital-to-analog converter box. Because digital tuner technology did not become widely available until after 2000, *see Consumer Elecs. Ass'n*, 347 F.3d at 294, virtually all digital tuner-equipped televisions, by law, contain a V-chip. *See* 47 U.S.C. § 303(x). And, by law, so do all government-subsidized set-top digital-to-analog converters. *See* 47 C.F.R. §§ 301.1–301.2, 301.5(d).

availability of filtering software, in conjunction with the possibility that Congress could "enact[] programs to promote [its] use," to be an effective alternative to direct suppression. 542 U.S. at 670. The fact that "Congress may not require [a voluntary blocking mechanism] to be *used*" "carries little weight." *Id.* at 669 (emphasis added). "[T]hat voluntary blocking requires a consumer to take action, or may be inconvenient," does not make a less restrictive alternative *ineffective*. *Playboy*, 529 U.S. at 824. The government may not directly regulate the content of speech on the basis of a "presum[ption]" that "parents, given full information, will fail to act." *Id.*

Second, the Commission argued that because the V-chip system "depends on the accuracy of program ratings," it remains possible that a viewer could be exposed to content she intended to block if a program's "rating does not reflect the material that is broadcast." Pet. App. 109a. But this Court has held that the fact that a voluntary blocking system "may not go perfectly every time" does not disqualify it. *Playboy*, 529 U.S. at 824. Indeed, in *Playboy*, the Court acknowledged that there was "little doubt" that the existing voluntary blocking regime left open the possibility that "some children will be exposed" because of delays in the administration of blocking requests by "unresponsive operators." *Id.* at 824, 826. The government's burden, however, was to demonstrate that not even a "*hypothetical*, enhanced version" of the voluntary blocking regime—one that gave "operators ample incentive, through fines or other penalties for noncompliance, to respond to blocking requests in prompt and efficient fashion"—could be effective to accomplish the government's aims. *Id.* at 823, 824 (emphasis added). Here, the Commission failed to demonstrate even that the *current* V-chip system is ineffective at empowering

parents to block indecent content from their children; and it did not address, much less prove the ineffectiveness of, "hypothetical, enhanced" V-chip systems.

The Commission's failure of proof is unsurprising: *Congress itself concluded that the V-chip and program ratings would be effective*, finding that "[p]roviding parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling government interest." Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(a)(9), 110 Stat. 140. President Clinton endorsed this finding, predicting that the V-chip will "empower families to choose the kind of programming suitable for their children." Statement by President William J. Clinton Upon Signing the Telecommunications Act of 1996, 1996 U.S.C.C.A.N. 228-1, 228-3 (Feb. 8, 1996). Indeed, even the Commission previously acknowledged that the current V-chip system is an "acceptable" means of accomplishing Congress's objective of giving parents "an effective method . . . to block programming they believe harmful to their children." *In re Implementation of Section 551 of the Telecommunications Act of 1996*, 13 F.C.C.R. 8232, 8233 ¶ 2 (1998). If not to its own judgment, the Commission owes substantial deference at least to that of the President and the Congress. *See Turner*, 512 U.S. at 665.

II. The Remand Order Fails To Provide A Reasoned Explanation For The Agency's Radical Change In Course

When an agency undertakes "a reversal of policy," the APA's mandate of reasoned decision making requires it to "adequately explain[] the reasons" for the

change. *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Indeed, "[a]n agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (Roberts, J.). And where, as here, "an agency is applying a multi-factor test through case-by-case adjudication," "[t]he need for an explanation is particularly acute." *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.).

The Commission asserts that its explanation for its radical change in course with respect to fleeting expletives "fully satisfied the requirements of the APA." FCC Br. 17. For at least three reasons, the Commission is incorrect.

1. Of course, it is the explanation provided by the agency—not that of its lawyers (or, for that matter, Judge Leval)—that this Court must evaluate. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action. . . . [A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."). So we look to the Remand Order itself for the agency's rationales. And in the Remand Order, far from forthrightly explaining the reasons for its change in policy, the Commission *denied* that it had changed its fleeting expletive policy *at all*. There can be no reasonable explanation for a change in agency policy when the agency refuses to acknowledge even that the policy has changed.

For nearly 30 years, the Commission generally viewed isolated utterances of expletives as falling outside the scope of its definition of indecency—either because the expletive did not depict or de-

scribe sexual or excretory activity, or, in the rare cases when the expletive did, in fact, depict or describe such activity, because the isolated and fleeting nature all but foreclosed a finding of patent offensiveness. In *Golden Globe II* and the Omnibus Order, the Commission abandoned those precedents and held that *any* use of the "F-Word" and the "S-Word" is a depiction or description of sexual or excretory activity, and that all such utterances are presumptively patently offensive.

In the Remand Order, however, the Commission purported to discover "[a] long line of precedent" supporting the notion that the "F-Word"—even when used only "for emphasis or as an intensifier"—constitutes a depiction or description of sexual activity falling within "the subject matter scope of our indecency definition." Pet. App. 73a; *see also id.* at 83a ("it has long been clear that [expletives] fall within the subject matter scope of our indecency definition, which since *Pacifica* has involved the description of sexual or excretory organs or activities"). That order similarly dismissed as "staff letters and dicta" the corpus of pre-*Golden Globe* agency precedent establishing that the fact that an expletive was uttered in a passing or fleeting manner and was not repeated weighed forcefully against a finding that the utterance was patently offensive. *Id.* at 79a. And purporting to discern no change in its policy with respect to fleeting expletives, the Commission rejected the broadcasters' argument that "Nicole Richie's comments would not have been actionably indecent prior to [the Commission's] *Golden Globe* decision." *Id.* at 80a–81a. This is hardly a "candid recognition" of a "change in policy." FCC Br. 23. It is a stubborn, and absurd, insistence that there had been no change at all. And every court of appeals that has confronted the Commission's intransigence has concluded—

correctly—that it violates the APA. *See CBS Corp. v. FCC*, — F.3d —, No. 06-3575, 2008 WL 2789307, at *12, *16 (3d Cir. July 21, 2008).

2. Nor did the Remand Order provide any rationale capable of justifying the Commission's new conclusion that any use of the "F-Word" and the "S-Word" is within the subject-matter scope of its indecency definition. Under the first step of the Commission's definition of broadcast indecency, the image or utterance "*must* describe or depict sexual or excretory organs or activities." Pet. App. 71a–72a (citing *Industry Guidance*, 16 F.C.C.R. at 8002 ¶ 8) (emphasis added). The Commission long has acknowledged that some uses of expletives such as the "F-Word" do not carry a sexual meaning and therefore often fall outside the subject-matter scope of the Commission's indecency definition. *See, e.g., In re Applications of Lincoln Dellar*, 8 F.C.C.R. at 2585 ¶ 26 (news anchor exclamation that he had "fucked that one up" held to have no sexual meaning). The Remand Order, however, came to an entirely different conclusion, holding that Cher's and Nicole Richie's obviously non-literal uses of the "F-Word" and, indeed, *any* use of the "F-Word," "falls within the scope of [its] indecency definition." Pet. App. 73a–74a.

The Commission offered the following defense of its conclusion: "Given the core meaning of the 'F-Word,' any use of that word has a sexual connotation even if [it] is not used literally." Pet. App. 73a–74a; *see also Golden Globe II*, 19 F.C.C.R. at 4978 ¶ 8 ("any use of [the 'F-Word'] or a variation, in any context, inherently has a sexual connotation"). Even if one assumes (as the Commission apparently does) that a "sexual connotation" constitutes a "depiction" or "description" of sexual activity, *but cf.*

Interstate Circuit v. City of Dallas, 390 U.S. 676, 686 (1968) (rejecting proscription of "portrayal of 'sexual promiscuity'" that was "implicit rather than explicit, *i.e.*, that it was a product of inference by, and imagination of, the viewer"), the Commission's reasoning is just an *ipse dixit*: The word is a depiction of sex because the Commission says it is a depiction of sex. Noticeably absent is *any* explanation for the *change* in the Commission's view as to the *meanings* of the "F-Word."

In this context, the Commission is obligated to explain how the "F-Word" came to develop the invariable "core meaning" that so consistently escaped the Commission's understanding for 30 years. If the Commission believes the meaning and usage of the "F-Word" have narrowed considerably since 2001—it claims *now* to have "studied the issue" (FCC Br. 18)—it is obligated at least to say so and to justify its conclusion with reasoned argument and evidence. But three times now—first in *Golden Globe II*, then in the Omnibus Order, and finally in the Remand Order—the Commission failed to do so, in the final iteration failing even to acknowledge that there had been any change at all. A "barebones incantation of . . . rationales cannot do service as the requisite 'reasoned basis' for altering its long-established policy." *Action for Children's Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987).

The only argument remotely resembling an explanation for the Commission's change in course came to the Commission as an afterthought: "Moreover, in certain cases, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions." Pet. App. 83a. That's it. But far from providing a justification for the Commission's

position, this argument illustrates its silliness. The issue is not confusing with respect to the programs in dispute here. For example, no viewer of the 2002 Billboard Awards could reasonably believe that Cher was actually exhorting her audience to have sexual congress with her critics, or that she was otherwise "depicting" or "describing" sexual activity. Nor is the issue arcane with respect to countless other examples drawn from actual experience, such as President Bush's famous remark to Prime Minister Blair, or Vice President Cheney's altercation with Senator Leahy on the Senate floor. *See id.* at 29a–30a.[18]

If the Commission is not required to justify changes in its views as to the meaning of particular words (which is to say, speech)—if it is permitted to redefine words on the basis of its assertedly superior "position to evaluate the connotations of language" (FCC Br. 18)—there is no effective limit on the subject-matter scope of the Commission's indecency jurisdiction. The court of appeals was right to reject the Commission's transparent efforts to circumvent its own indecency definition and expand its censorship jurisdiction without so much as an attempted, let alone reasonable, explanation.

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[18] The Commission's lawyers now argue that treating all uses of the "F-Word" and the "S-Word" as having sexual or excretory meaning is permissible because the "subtle distinctions" "between literal and figurative uses" may be lost on children. FCC Br. 35. This line of reasoning reduces for all broadcasting not just the content, but now also the vocabulary, to that fit for children. Moreover, if the Commission is correct, if a child cannot determine whether Cher actually wanted her audience to have sex with her critics, one is left to wonder how that child possibly could discern whether particular uses of those words have "artistic merit"—a determination on which the Commission's analysis of patent offensiveness now entirely turns.

3. The Commission also failed to offer any explanation for its decision to disregard completely one of the three "principal factors" it previously had identified as pivotal in determining whether material is "patently offensive"—the second step of the Commission's indecency definition. *Industry Guidance*, 16 F.C.C.R. at 8002–03 ¶¶ 8, 10. The Commission now attempts to frame its elision of the second "principal factor" as a reasonable rejection of a "per se, one-free-expletive rule" to which it supposedly had adhered. FCC Br. 17. But this case has nothing at all to do with a "one-free-expletive rule." The Commission (as opposed it its lawyers) has categorically denied ever observing such a rule, *see* Pet. App. 85a, and respondents do not ask this Court to adopt it.[19]

The change in the Commission's policy is this: Prior to *Golden Globe II*, in cases involving fleeting utterances of expletives, the Commission accorded *significant weight* to the fact that the material did not "dwell[] on or repeat[] at length" disputed expletives. *See*, *e.g.*, *Industry Guidance*, 16 F.C.C.R. at 8008 ¶ 17. Now the Commission accords effectively *no weight* to this "principal factor," with the result that the Commission deems *all* utterances of expletives—even fleeting utterances—as presumptively indecent, with the final determination turning on the

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19 Because there never has been an "automatic exemption to the indecency prohibition for nonrepeated expletives," there is no basis for the Commission's "predictive judgment" (FCC Br. 37) that continuing the pre-*Golden Globe II* policy would "permit broadcasters to air expletives at all hours of a day so long as they did so one at a time." Pet. App. 85a. Broadcasters generally do not permit the broadcast of expletives even at times of day when the broadcast of *indecent* material is undoubtedly permitted. *Id.* at 86a–87a. The specter of daytime television programming heavily salted with "one free expletive" is entirely a figment of the Commission's overly active imagination.

Commission's subjective view on whether the utterance in question was "shocking" or had "artistic merit." Pet. App. 75a, 76a n.44. The case thus involves not a "one-free-expletive rule," but a "one-word-and-you're-out rule," with an exception for materials that the Commissioners and their advisors happen to like, such as *Saving Private Ryan*.

To justify *that* change in policy, the Commission argued that excusing "'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" Pet. App. 84a. But language that is not indecent threatens no cognizable harm and thus cannot be said to amount to a "blow" at all. The Commission's proffered rationale—that permitting even an isolated expletive forces viewers to absorb the "first blow"—thus takes as an assumption its ultimate conclusion, namely that a fleeting expletive constitutes "indecent language." A tautology is a grossly inadequate substitute for reasoned explanation and the court of appeals was right to reject it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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